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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-646

JAMES D. OREE,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO.

JAMES D. OREE,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, JAMES D. OREE, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit, without opinion, affirmed the judgment of the United States District Court for the Southern District of New York [Appendix A]. The opinion of the United States District Court for the Southern District of New York is unreported, and is printed in Appendix B.

JURISDICTION OF THIS COURT

[a] The judgment of the United States Court of Appeals affirming the judgment of conviction of petitioner was entered on September 27, 1972.

[b] Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the facts and surrounding circumstances warrant the granting of a new trial under Rule 33 of the Federal Rules of Criminal Procedure.

RULES OF COURT

Rule 33 of the Federal Rules of Criminal Procedure.

"The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period."

STATEMENT OF THE CASE

On March 26, 1970, petitioner was convicted on two counts of an indictment by a jury with four others, for violations of the Federal Narcotics Laws, Title 21 of the U.S.C. §173-174. The trial Court sentenced petitioner to a term of imprisonment for ten years. Petitioner's conviction was affirmed by the United States Court of Appeals for the Second Circuit. *United States v. Bellamy*, 436 F. 2d 542. Petition for certiorari was denied by this Court on April 26, 1971. (402 U.S. 929).

Thereafter, petitioner moved to vacate his conviction pursuant to Title 28 of the U.S.C., §2255, or, in the alternative, for an Order granting a new trial on the basis of newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The newly discovered evidence consisted of an affidavit executed January 9, 1968 [19a] by Dennis Copeman, a co-defendant, who testified for the Government in the trial. In the affidavit Copeman states:

> "I never saw Mr. Oree in Apt. 3G until he was brought to Apt. 3G by the Federal Agents."
>
> "I never saw Mr. Oree in possession of narcotics."
>
> "I never heard Mr. Oree discuss narcotics."
>
> "I never had any conversation with Mr. Oree on that day or any other day regarding narcotics."

The circumstances surrounding the execution of the discovery of the Copeman affidavit are set forth in the petition accompanying the motion. [5a - 9a, and 20a - 24a]. Dennis Copeman gave the affidavit to an associate of Irwin Klein, petitioner's original attorney on January 9, 1968. Klein was later substituted by trial counsel, Howard Diller. Petitioner claimed that the existence of the Copeman affidavit was not known to him or his trial counsel until October 30, 1970, when at a chance meeting at the Atlanta Penitentiary, Klein told petitioner of the existence of the Copeman affidavit.

It appears that shortly after petitioner retained Klein, he was informed by Klein that Klein had obtained written statements from other persons arrested with petitioner and these statements exonerated him. Petitioner was under the impression that Klein was referring to those persons who were at liberty at the time, and not defendants in the case. Copeman at that time was incarcerated on unrelated charges [7a]. Petitioner also claims that he relied completely upon trial counsel to obtain evidence and to try the case [8a]. Trial counsel did not request the file which contained the Copeman affidavit from petitioner's original attorney.

REASONS FOR GRANTING THE WRIT

A motion for a new trial based upon newly discovered evidence has been said to be *sui generis*. While it may be fair to

say that meritorious motions based upon this ground are few (See Federal Rules of Criminal Procedure, N.Y.U. Institute 1946, 230), these few cases alone justify the existence of a means to undo injustice.

The following are the essential requisites for a motion for a new trial based on newly discovered evidence:

> [1] The evidence must have been discovered since the trial.
>
> [2] The failure to produce the evidence at trial was not due to lack of diligence on defendant's part.
>
> [3] The evidence relied on must not be merely cumulative or impeaching.
>
> [4] It must be material to the issues in the trial, that it would probably produce a different verdict if a new trial were granted.

United States v. Costello, 255 F. 2d 876 (2nd Cir.), cert. den. 357 U.S. 937 (1958).

In the case at bar, the evidence in question is not cumulative but it is impeaching, which, under the aforementioned requirement would apparently prevent a new trial. It is impeaching evidence of a serious nature, especially under the circumstances of this case. Dennis Copeman, the Government's principal witness, was a convicted felon and parole violator serving a prison term. His pretrial affidavit is in direct conflict with his testimony at trial. In *Mesarosh v. United States*, 352 U.S. 1, 9, the Court made the following statement as to any newly discovered evidence affecting a witness' credibility at trial:

> "Such an allegation by the defense ordinarily will not support a motion for a new trial, because new evidence which is 'merely cumualtive or impeaching' is not, according to the often-repeated statement of the courts, an adequate basis for the granting of a new trial."

However, under the facts of this case, it is submitted this is not a case where the ordinary rule for not granting a new trial applies, and that the evidence here does not come within the general interdiction that the newly discovered evidence which is merely impeaching is ordinarily insufficient to warrant a new trial.

"Diligence" such as defendant must exercise in discovering evidence, is a relative term incapable of exact definition depending on light of peculiar circumstances. *People v. Williams*, 368 P. 2d 353 (Cal. 1962). Among the circumstances present in the instant case was the reliance of petitioner Oree upon trial counsel, Howard Diller, to consult with Irwin Klein and obtain from him the total file including any affidavits favorable to petitioner's case. At the time of trial, petitioner was not aware of Copeman's affidavit although Klein had previously mentioned to petitioner that he had obtained information from other persons involved. It was petitioner's impression that this applied only to those persons who were at liberty and not to Copeman and Hunter who had been incarcerated for an unrelated crime. Up until the time Copeman was severed as a defendant and testified for the Government, there was no reason for petitioner to believe that Copeman would be a witness for the prosecution.

The remaining requirement is that the newly discovered evidence must be of such a nature that in a new trial it would probably produce a different verdict. See *United States v. Miller*, 411 F. 2d 825, 830, 831 (2nd Cir. 1969) and cases therein cited. Without being able to use Copeman's affidavit during cross-examination, the jury was deprived of information which they could legitimately use in judging his credibility. This was a case where the jury had to determine whether to believe the word of Copeman, for he was the Government's principal witness, or reject it. Copeman was a material witness. His trial testimony contradicted by his prior sworn statement, plus his long criminal record, which weighs heavily in connection with credibility, could have well produced a state of mind with the jurors that Copeman was not telling the truth and therefore the Government had not established guilt beyond a reasonable doubt.

A different appraisal of Copeman's worthiness of belief might well lead to a different result in a new trial. Without a new trial, the verdict will be forever beclouded by the possibility that the jury unwittingly acted upon false testimony of an undisclosed perjurer and convict.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Raymond A. Brown, Esq.
Counsel for Petitioner
26 Journal Square
Jersey City, New Jersey

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of September, one thousand nine hundred and seventy-two

Present: HON. PAUL R. HAYS
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS

Circuit Judges,

United States of America,

Plaintiff-Appellee,

v.

James D. Cree,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

APPENDIX "B"

FILED JUNE 22, 1971

E.P. CH 3 MEMO 439

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

69 Cr. 424
71 Civ. 400
E.L.P.

JAMES D. OREE,

Petitioner.

PALMIERI, J.

This is a motion by petitioner, pursuant to Title 28, United States Code, Section 2255, for an order vacating the judgment of conviction or, in the alternative, for an order granting a new trial, pursuant to Rule 33, Federal Rules of Criminal Procedure. The alleged grounds of the motion are newly discovered evidence and failure by the Government to disclose exculpatory evidence. The relief sought is not supported on either ground. The alleged newly discovered evidence consists of an affidavit of Dennis Copeman a co-defendant whose case was served. He pleaded guilty and testified for the Government at the trial concerning the details of Oree's narcotics operation and the events of November 28, 1967, the date on which Oree and his co-defendants were arrested, and the report of an investigating narcotics agent, who did not testify at trial. These papers lack the necessary persuasiveness or solidity to sustain petitioner's claim.

The affidavit of Copeman purport to absolve the petitioner and was allegedly in the hands of an attorney who represented Oree in the early stages of the case but not at trial—Irwin Klein, Esq. This affidavit was available to Oree when new counsel was substituted and could have been readily obtained by the

exercise of minimal diligence. If neither Oree nor his trial counsel sought out this file it was plain negligence and its discovery after trial can hardly be raised to the dignity of a reason for a new trial. It is clear that with due diligence this file could have become available to the petitioner. See *United States* v. Capace, 387 F. 2d 537 (2d Cir. 1961), *cert. denied*, 362 U.S. 374 (1961): *Wright v. United States*, 353 F. 2d 362 (9th Cir. 1965), *United States v. Barbera*, 213 F. Supp. 923 (S.D.N.Y. 1963).

Additionally, the petitioner has failed to offer the slightest evidentiary basis for the claim that Copeman's affidavit was known to the Government and suppressed by it. The affidavits submitted by the Government make it clear that this affidavit was not known to the Government attorneys. Nor can the petitioner claim that there was suppression of the existence of an additional investigating narcotics agent, Richard C. Johnson, who might have contradicted the agents who testified. Quite the contrary is true. Agent Johnson's report makes it clear that additional narcotics were found in Oree's car and this evidence far from exculpating Oree, would have had a seriously disadvantageous effect upon his *claim of innocence*.

Lastly, there was evidence at the trial, apart from Copeman's testimony, which seriously involved petitioner in the illicit narcotics business. At best the petitioner's papers do no more than indicate that the Copeman affidavit could have been used to impeach Copeman as a witness and is consequently insufficient as a basis for a motion of this character. See *United States v. Polisi*, 416 F. 2d 573, 576-577 (2d Cir. 1969).

The motion is denied. It is so ordered.

Dated: New York, N.Y.
June 22, 1971

EDMUND L. PALMIERI
U.S.D.J.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-646

JAMES D. OREE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals wrote no opinion. The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1972 (Pet. App. A). The petition for a writ of certiorari was filed on October 26, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly denied a motion for a new trial on the ground of newly discovered evidence.

STATEMENT

In 1970, following a jury trial in the United States District Court for the Southern District of New York, petitioner and three codefendants were convicted of narcotics offenses and petitioner was sentenced to ten years' imprisonment. On January 4, 1971, the court of appeals affirmed (*United States* v. *Bellamy, et al.*, 436 F. 2d 542 (C.A. 2)), and on April 26, 1971, this Court denied certiorari (402 U.S. 929). On January 29, 1971, a week prior to the filing of the original certiorari petition, petitioner filed in the district court a motion under 28 U.S.C. 2255 to vacate his conviction or in the alternative for a new trial on the ground of newly discovered evidence (hereafter referred to as the motion for a new trial) alleging that he had discovered after the trial that Dennis Copeman, a codefendant who had pleaded guilty and testified for the government, had made a pre-trial statement exonerating him of guilt (R. 1).[1] The district court denied the motion (Pet. App. B; R. 6) and the court of appeals affirmed (Pet. App. A).

1. The evidence at trial[2] showed that in August 1967 petitioner asked Copeman to run a "mill" for the packaging and distribution of heroin. On several occasions during the next few months Copeman conducted such an operation for petitioner. On November 29, 1967, petitioner told Copeman that another shipment of heroin had arrived and directed him to go

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[1] "R." refers to the numbered documents in the certified record on file in the Clerk's office.

[2] See 436 F. 2d at 544; government's Brief in Opposition, No. 1307, O.T. 1970, pp. 2-5.

that evening to apartment 3G at a designated address to package it. At 2 p.m. that day, narcotics agents saw petitioner enter apartment 3G with a plaid suitcase and depart shortly afterward without it. Later the agents saw codefendant James Hunter and several other persons enter the apartment. At 5:30 p.m., Copeman entered the apartment and supervised the packaging of the heroin after seeing another defendant remove it from a plaid suitcase. At 8 p.m., petitioner returned to the apartment and directed Copeman to give Hunter twenty-five bundles of the packaged heroin, which Copeman did, delivering the bundles to Hunter in a brown paper bag. Petitioner and Hunter then left together. As the two were leaving the building, petitioner, who was then carrying the bag, looked in the direction of the agents, stiffened, and shoved the bag to Hunter. The agents arrested both men and seized the bag, which subsequent examination proved contained heroin. Shortly thereafter the agents arrested Copeman as he emerged from an elevator carrying the plaid suitcase. The agents seized the suitcase and found the remainder of the heroin in it.

The defense presented no evidence.

2. The allegedly newly discovered evidence consisted of an affidavit made by Copeman in January 1968, 16 months before the return of the indictment, in which he stated that he had never seen petitioner in apartment 3G until petitioner was brought there by the agents, and that he had never seen petitioner in possession of, heard him discuss, or had a conversation with him concerning, narcotics (Pet. 3). The affidavit was given by Copeman to an assistant of Irwin Klein, the

attorney then representing petitioner, at a New York jail where Copeman was confined on an unrelated matter. Klein, who also represented Copeman at the time, had sent his assistant to the jail to try to secure such an affidavit after petitioner had assertedly told Klein that he had not been involved in the narcotics transactions and that the persons who were involved would so attest. Similar affidavits, exonerating petitioner, were secured by Klein at about the same time from the other persons charged in the narcotics matter (including Hunter, who also was in jail), all of whom were also then represented by Klein (R. 1, affidavit of Klein, p. 2).

Shortly after the return of the indictment (May 14, 1969), petitioner discharged Klein and retained a new lawyer, Howard Diller, to represent him.[3] Diller thereafter continued to represent petitioner until after the trial, which occurred in March 1970. In an affidavit accompanying petitioner's motion for a new trial, Klein asserted that he told Diller, following Klein's discharge, that he was willing to cooperate with Diller and go over his files in the case with him. Klein further stated that he did not in fact discuss the case or go over the files with Diller, since Diller never requested him to. Following his discharge, Klein also suggested to petitioner by letter that petitioner communicate with him regarding the case, but he never heard from

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[3] While the record does not reflect the dates or the circumstances, the other defendants too, evidently, discharged Klein as their counsel before trial. The record in any event shows that Klein did not participate in the trial.

petitioner again until after the trial (R. 1, affidavit of Klein, pp. 1-2; R. 1, affidavit of petitioner, p. 3).

In an affidavit by petitioner, filed in support of the new trial motion, petitioner admitted that Klein had told him that Klein had secured such written statements from the other accused persons, but that petitioner had assumed Klein was referring to those who were at liberty. He did not know that Klein had also secured such statements from Copeman and Hunter, the two accused who were in jail. Petitioner attested that he first learned of Copeman's affidavit at a chance meeting with Klein in the Atlanta Penitentiary in October 1970, seven months after the trial. On that occasion, according to petitioner, he mentioned to Klein that he had been tried and convicted and that Copeman had been a witness against him, whereupon Klein advised him of Copeman's affidavit (R. 1, affidavit of petitioner, pp. 4-5).

ARGUMENT

Petitioner's contention that he was entitled to a new trial is not well founded. To be entitled to a new trial on the ground of newly discovered evidence, a defendant must show that the failure to produce the evidence at trial was not due to lack of diligence on the part of the defendant, that the new evidence is not merely cumulative or impeaching, and that it is of such quality that the probable result of a new trial would be acquittal. *King* v. *United States,* 402 F. 2d 289, 292 (C.A. 10); *Wright* v. *United States,* 353 F. 2d 362, 365 (C.A. 9); *Pitts* v. *United States,* 263 F. 2d 808, 810 (C.A. 9), certiorari denied, 360 U.S. 919; *United*

States v. *Costello*, 255 F. 2d 876, 879 (C.A. 2), certiorari denied, 357 U.S. 937; cf. *Mesarosh* v. *United States*, 352 U.S. 1, 9. None of these requirements was met here.

The alleged new evidence, Copeman's pre-trial affidavit, was obtained by petitioner's own attorney pursuant to petitioner's assertion that he was innocent and that the other accused persons would so state. Petitioner admitted in the motion papers that the attorney had advised him that affidavits exonerating him had been secured from those others, but claimed he had not realized, because Copeman was in jail at the time, that Copeman had been one of those approached. Whether or not petitioner's alleged misunderstanding of what the attorney had told him was justified, the fact remains that, as the district court noted, Copeman's affidavit was available to petitioner when he discharged the attorney and substituted a new one and could have been readily obtained by the exercise of minimal diligence. If neither petitioner nor his trial counsel sought out the first attorney's file in the case, containing the affidavit, it was plain negligence on their part, as the court observed, and its alleged post-trial discovery was not a sound reason for granting a new trial. Cf. *United States* v. *Capece*, 287 F. 2d 537, 538 (C.A. 2), certiorari denied, 368 U.S. 847; *United States* v. *Costello*, *supra*, 255 F. 2d at 879-881.

Nor were the other tests mentioned above satisfied. That Copeman's affidavit would at most have supplied a basis for impeaching his credibility as a witness is evident and conceded (Pet. 4). And since, as the district court pointed out, there was evidence apart from

Copeman's testimony which compellingly implicated petitioner in the illegal actions with which he was charged (including his observed transfer to Hunter of the bag containing heroin immediately prior to the arrests), petitioner has not established that the probable result of a retrial would be acquittal.

At all events, the granting or denial of a new trial on the ground of newly discovered evidence is a matter within the sound discretion of the trial court. There is no showing that that discretion was abused here. See *United States* v. *Maddox*, 444 F. 2d 148, 152 (C.A. 2); *United States* v. *Gaither*, 440 F. 2d 262, 264 (C.A. D.C.); *Robinson* v. *United States*, 345 F. 2d 1007, 1011 (C.A. 10), certiorari denied, 382 U.S. 839; *cf. United States* v. *Johnson*, 327 U.S. 106.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

DECEMBER 1972.

☆ U. S. Government Printing Office: 1972—491-046/379